

FILED

DEC 27 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS OFFICE

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

U.S. Attorney No. 01 CR 30184

SEARS AUTOMOTIVE MARKETING)
SERVICES, INC., a Delaware Corporation,)

Defendant.)

PRETRIAL DIVERSION AGREEMENT

It appearing that you are reported to have committed an offense against the United States beginning in or about September 1994 and continuing to and including March 1995, in violation of Title 18, United States Code, Section 1341, in that you are reported to have engaged in a mail fraud violation as set forth in the subject Information attached hereto and incorporated by reference as Exhibit A.

Upon accepting responsibility for your behavior as set forth in the "Stipulation of Facts" and by your authorized signature on this Agreement, it appearing, after an investigation of the offense, that the interests of the United States and your own interest and the interests of justice will be served by the following procedure, therefore:

On the authority of the Criminal Division, U.S. Department of Justice, prosecution in the Southern District of Illinois for this offense shall be deferred for a period of 18 months or the last payment, whichever is later, from this date, provided you abide by the following conditions and the requirements of the program set out below.

This agreement shall be binding not only on Sears Automotive Marketing Services, Inc. [hereinafter "SAMS"], but shall also be binding on Sears, Roebuck and Company [hereinafter "Sears"], its office

representatives, agents and employees directly or through any corporation, subsidiary, division, or other entity. SAMS acknowledges that it was and is a wholly owned subsidiary of Sears. Any and all references in this Agreement to Sears shall also be a reference to SAMS.

Should you violate the conditions of this supervision, the government may revoke or modify any conditions of this pretrial diversion program or change the period of supervision which shall in no case exceed 18 months or the last payment date, whichever is later. The government may release you from supervision at any time. The government may at any time within the period of your supervision initiate prosecution for this offense against SAMS and/or Sears should you violate the terms of this Agreement as set forth hereinbelow. In this case, the government will furnish you with notice specifying the conditions of the Agreement which you have violated. The government may extend your term of supervision if you fail to comply with all conditions.

If, upon completion of your period of supervision, a pretrial diversion report is received to the effect that you have complied with all the rules, regulations and conditions above-mentioned, no criminal prosecution for the offense set out above will be instituted in this District or elsewhere, and the Information will be discharged.

This agreement and all related documents may be released by the United States Attorney's Office. Sears hereby waives all compliance requirements of the Privacy Act of 1974 (Title 5, U.S.C., Section 552(a)) with regard to the above-described offense.

SAMS and Sears are aware that Rule 48(b) of the Federal Rules of Criminal Procedure provides that the Court may dismiss an indictment, information, or complaint for unnecessary delay in presenting a charge to the Grand Jury, filing an information or in bringing a defendant to trial. Sears hereby requests that the United States Attorney's Office for the Southern District of Illinois defer any prosecution of it for violati

of Title 18, United States Code, Section 1341, for the period of 18 months, or the date of final payment, whichever is later, and to induce the government to defer such prosecution SAMS and Sears agree and consent that any delay from the date of this Agreement to the date of the initiation of the prosecution, as provided for in the terms expressed herein, shall be deemed to be a necessary delay at SAMS' and/or Sears' request and SAMS and Sears waive any defense to such prosecution on the ground that such delay operated to deny SAMS' and/or Sears' rights under Rule 48(b) of the Federal Rules of Criminal Procedure or to bar the prosecution by reason of the running of the statute of limitations for a period of 18 months, or the date of final payment, whichever is later, which is the period of this Agreement.

CONDITIONS OF PRETRIAL DIVERSION

No Illegal Conduct

1. SAMS and/or Sears shall not violate any law (federal, state or local).

Cooperation

2. Disclosure Of Documents To Which The Attorney-Client Privilege Attaches: In order to aid the Government in any continuing aspects of its investigation against other third parties and in the event that the Government deems it necessary to its investigation and issues a subpoena, SAMS and/or Sears agree to produce additional documents in their possession created between January 1, 1994, and March 1, 1999, relating to their relationship with Exide, and their advertising, labeling, promotion, offering for sale, sale or distribution of DieHard-brand batteries that have been withheld from the Government on the ground of attorney-client privilege. In making any such production of additional documents to assist the Government's enforcement efforts, SAMS and/or Sears neither expressly nor impliedly waive their rights to assert any privilege with respect to the produced documents or the subject matters thereof that is available under law against non-parties to this Agreement. The privileged materials and information provided pursuant to this

Agreement are for the limited purpose of cooperation in the criminal investigations of third-parties, which investigations the Government acknowledges are confidential and for purposes of any trial.

3. SAMS and/or Sears will not waive attorney-client privilege, attorney work product privilege, or any other applicable state or federal privilege with respect to its relationship with Assix International, Inc., the termination of that relationship, or Sears' sale of the AccuBalance service.

4. Encouraging Cooperation Of Employees: SAMS and/or Sears will use their best efforts to make available for interviews, or for testimony, present or former Sears officers, directors, and employees as requested by the government. SAMS and/or Sears and Sears' Chairman agree to instruct these officers, directors and employees to cooperate fully and completely with the government. SAMS and/or Sears will provide qualified custodians of records to introduce into evidence documents produced by SAMS and/or Sears.

5. General Cooperation: SAMS and/or Sears agree to respond truthfully and completely, through its counsel or other qualified representative, to any questions or inquiries directed to SAMS and/or Sears relating to this investigation. SAMS and/or Sears will assemble and organize all documents, records, or other tangible evidence in Sears' possession, custody, or control, as requested by the government.

Payment To The United States

6. SAMS and/or Sears and the government do not have evidence that specific persons suffered any actual damages traceable to this offense conduct, except those persons who have already exercised their warranty rights to have Sears provide new batteries. Therefore, SAMS and/or Sears are not making restitution as would be appropriate under 18 U.S.C. 3663 and 3663A. SAMS and/or Sears shall make a monetary payment in this matter in the amount of Sixty-Two Million Six Hundred Thousand Dollars (\$62,600,000.00), to be paid according to the following schedule. SAMS and/or Sears will pay Ten Million

Dollars (\$10,000,000.00) within 30 days of approval by U.S. Probation. SAMS and/or Sears will make a second payment to the Government of Ten Million Dollars (\$10,000,000.00) by January 15, 2003. SAMS and/or Sears will make a third payment to the Government of Ten Million Dollars (\$10,000,000.00) by January 15, 2004. SAMS and/or Sears will make a fourth payment to the Government of Ten Million Dollars (\$10,000,000.00) by January 15, 2005. SAMS and/or Sears will make a fifth payment to the Government of Ten Million Dollars (\$10,000,000.00) by January 15, 2006. SAMS and/or Sears will make a sixth and final payment of Twelve Million Six Hundred Thousand Dollars (\$12,600,000.00) by January 15, 2007. SAMS and/or Sears may pre-pay the monetary payments as called for in this paragraph. In the event that the District Court does not approve this Agreement, any payments made pursuant to this Agreement shall be refunded.

The payment shall be applied as follows:

a. Fifteen Million Dollars (\$15,000,000.00) to the United States Postal Inspection Service Consumer Fraud Awareness Fund account, said monies to be used to support activities which facilitate and support the prevention and investigation of frauds against the public. The Chief Postal Inspector will report yearly to the Court the status of all disbursements from these funds. The Fifteen Million Dollars (\$15,000,000.00) will be paid out of the first two annual installments.

b. Forty Seven Million Six Hundred Thousand Dollars (\$47,600,000.00) to the United States Treasury.

Sears Advertising Practices

7. Cease And Desist Agreement: SAMS and/or Sears, its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division, or other entity, in connection with its advertising, labeling, promotion, offering for sale, sale or distribution of DieHard brand batteries, shall not

a. Make any material statements or representations, directly or by implication, concerning the performance of DieHard brand batteries unless such statements or representations are true and unless, at the time the statements or representations are made, Sears possesses and relies on a reasonable basis for such statements or representations, which shall consist of competent and reliable tests consistent with industry standards and norms for the product, or other competent and reliable evidence that substantiates such statements or representations.

b. Materially misrepresent in connection with the advertisement of DieHard brand batteries, and/or any particular DieHard battery product line, or in any other manner, directly or by implication, the existence, purpose, content, validity, result, interpretation or conclusion of any test, experiment, demonstration, study, survey, report, or research; and

c. Make any material misrepresentation about the quality or features of DieHard brand batteries, including misrepresenting, directly or by implication, that DieHard brand batteries possess any technological advancements and/or proprietary features that they do not in fact possess.

8. Retention Of Records: SAMS and/or Sears, their officers, representatives, agents and employees, directly or through any corporation, subsidiary, division, or other entity, in connection with the advertising, labeling, promotion, offering for sale, sale or distribution of DieHard brand batteries, shall maintain written records for a period of three (3) years:

a. Of all advertisements and promotional materials that make any representation about the quality or features of any DieHard brand battery;

b. Of all materials that were relied upon in making any claim or representation in advertising sales materials, promotional materials, or post purchase materials, concerning the performance characteristics of any DieHard brand battery; and

c. Of all test reports, studies, surveys, or demonstrations in Sears' possession that contradict, qualify, or call into question any claim or representation in advertising, sales materials, promotional materials, or post purchase materials disseminated by Sears, or by any advertising agency on behalf of Sears, concerning the performance characteristics of any DieHard brand battery.

9. For purposes of paragraphs 7 and 8, the term "DieHard brand battery" means automotive, lawn and garden, marine, or motorcycle batteries. The phrase "competent and reliable test" means a test in which persons with skill and expert knowledge in the field to which the test pertains, conduct the test and evaluate its results in an objective manner, using test procedures that ensure accurate and reliable results. Such tests must be truly and fully representative of expected consumer usage.

10. SAMS and/or Sears shall deliver a document setting forth the substance of paragraphs 7, 8, and 9 to each of its operating divisions, and to each of its officers, agents, representatives and employees engaged in or connected with the preparation and placement of advertisements for DieHard brand batteries.

PROMISES BY THE UNITED STATES OF AMERICA

11. Non-Prosecution of SAMS and/or Sears: In consideration of the foregoing undertakings by SAMS and/or Sears, the Government will not charge SAMS, Sears, their predecessors, successors, or assigns or any Sears subsidiaries, divisions or affiliates. The government has informed SAMS and/or Sears that it will not seek to charge any former or current officers or employees of SAMS and/or Sears with any federal offenses relating in any way to the sale of DieHard automotive batteries manufactured by Exide Corporation from 1994 through 1999 or relating in any way to Sears' relationship with Assix International, Inc., the termination of that relationship, or Sears' sale of the AccuBalance service.

12. Release Of Civil Liability: By entering into this Agreement, the United States has released any and all civil liability arising out of the sale of batteries and the Sears/Assix business transaction :

investigated by the government that SAMS and/or Sears, their predecessors, successors, or assigns; any Sears subsidiaries, divisions or affiliates; any current or former officers or employees of Sears, their subsidiaries, divisions, or affiliates may have incurred at any time as a result of their conduct in the sale of DieHard automotive batteries produced by Exide Corporation or in Sears' relationship with Assix International, Inc., the termination of that relationship, or Sears' sale of the AccuBalance service.

VIOLATION OF CONDITIONS OF PRETRIAL DIVERSION

13. It shall be a violation of the conditions of pretrial diversion for SAMS and/or Sears to fail to abide by or fully perform any of the promises set forth in paragraphs 1 to 10 above, during the eighteen (18) months following the signing of this Agreement or the date of the last payment, whichever date is later, and the Agreement shall expire on that date, with the exception that SAMS' and/or Sears' undertakings with respect to paragraph 6 of this Agreement will be binding for the time period set forth in that paragraph.

14. In the event that the government believes that SAMS and/or Sears respectively have violated the conditions of pre-trial diversion, the government shall provide SAMS and/or Sears respectively with written notice of such breach, and SAMS and/or Sears respectively shall have thirty (30) days therefrom in which to respond and cure the breach.

15. In the event that the government believes that SAMS and/or Sears have violated the conditions of pre-trial diversion, and that SAMS and/or Sears have not adequately cured the breach, the government shall initiate proceedings in the District Court to determine whether a violation has occurred.

WAIVER OF STATUTE OF LIMITATIONS

16. Upon a finding by the Court of a violation of any term in this Agreement, SAMS and/or Sears agree to toll the statute of limitations for eighteen (18) months, from the date the violation is determined to have occurred, ~~SAMS and/or Sears~~ ^{FJW/LAB/ADK} for any federal criminal offense that relates to:

a. The advertising, labeling, promotion, offering for sale, sale or distribution of DieHard batteries manufactured by Exide Corporation from 1994 through 1999; or

b. Sears' relationship with Assix International, Inc., the termination of that relationship, and Sears' provision of the AccuBalance service.

c. Sears and SAMS expressly acknowledge that this waiver of statute of limitations is knowing and voluntary and in express reliance on the advice of counsel. Sears and SAMS agree that in the event that the criminal prosecution is reinstated pursuant to the terms of this agreement, that they shall not raise as an affirmative defense or other legal argument, the statute of limitations as a bar to prosecution. Sears and SAMS agree that the statute of limitations is not a jurisdictional bar to prosecution and may be waived pursuant to law.

REINSTATEMENT OF PROSECUTION

17. Should the government and district court declare this Agreement violated,

a. The government will no longer be bound by its promises concerning non-prosecution and will be free to bring a prosecution against SAMS, Sears, or any entity or person for any federal offense.

b. The government will be free to use any information provided by SAMS and/or Sears under the terms of this Agreement in any criminal prosecution the government may bring against ^{them} ~~it~~, and SAMS and/or Sears will be unable to assert any constitutional or statutory right of privilege, or claim that the information is inadmissible because of Rule 11(e)(6) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other statute or rule with the exception stated hereinbelow.

MISCELLANEOUS PROVISIONS

18. Preservation Of Rights Under Federal Rule Of Evidence 408: Nothing stated in this Agreement is intended to or shall operate as an admission or a waiver of any rights SAMS and/or Sears may have pursuant to Fed.R.Evid. 408.

19. Authority: Each of the attorneys executing this Agreement on behalf of SAMS and/or Sears and the Government warrants and represents that he or she has been duly authorized and empowered to execute this Agreement on behalf of each such respective party.

20. Effective Date: This pre-trial diversion agreement becomes effective upon acceptance by the U.S. Office of Probation and upon written notice to SAMS and/or Sears and in no case earlier than December 28, 2001.

SAMS and Sears hereby state that the above has been read and explained to SAMS and Sears. SAMS and Sears understand the conditions of its pretrial diversion and agrees that they will comply.

Anastasia D. Kelly 12/14/01
ANASTASIA D. KELLY
Director of Sears Automotive Marketing
Services, Inc.

Miriam F. Miquelon
MIRIAM F. MIQUELON
Assistant United States Attorney

F. Joseph Warin
F. JOSEPH WARIN
Gibson, Dunn and Crutcher LLP

Hal Goldsmith
HAL GOLDSMITH
Assistant United States Attorney

Lanny A. Breuer / FJB
LANNY A. BREUER
Covington and Burling

Linda C. Fletcher
United States Probation Officer

Date: 12/12/01

Date: 12/27/01

Norman R. Smith, General
Division Chief 12/18/01
EOUSA 1610

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,)
) CRIMINAL NO. _____
Plaintiff,)
) Title 18,
vs.) United States Code,
) Sections 1341, 2, and
SEARS AUTOMOTIVE MARKETING) 3551 <u>et seq.</u>
SERVICES, INC., a Delaware Corporation,)
)
Defendant.)

INFORMATION

THE UNITED STATES ATTORNEY CHARGES:

INTRODUCTION

At all times relevant to the Information:

1. **SEARS AUTOMOTIVE MARKETING SERVICES, INC.** [hereinafter referred to as "SAMS"] was a Delaware corporation and a wholly owned subsidiary of Sears, Roebuck and Company [hereinafter referred to as "Sears"]. Sears engaged in the business of selling, among other things, Exide-manufactured DieHard brand batteries to consumers in Illinois, and in other states.

2. In or about and between September 1, 1994, and December 31, 1998, Sears sold Exide-manufactured DieHard brand batteries out of the following Sears Automotive locations in the Southern District of Illinois:

Store Number 6150
Fairview Heights, Illinois

Store Number 6510
Marion, Illinois

Store Number 6756
Alton, Illinois

SCHEME TO DEFRAUD

3. Sears would and did affirmatively misrepresent to consumers that the Exide-manufactured DieHard brand battery was America's most trusted battery and longest lasting battery when in truth and in fact, the battery batch distributed in September 1994 through early 1995 was manufactured with a formation defect that could have impaired the cold cranking amps and reserve capacity as advertised on the face of the battery.

4. Sears would and did affirmatively misrepresent to consumers that the Exide-manufactured DieHard brand battery contained certain proprietary features including Silvium II, when in truth and in fact, there were only trace amounts of Silvium II in the battery.

5. From in or about November 1994, that date being approximate, within St. Clair County, the Southern District of Illinois and elsewhere, the defendant,

SEARS AUTOMOTIVE MARKETING SERVICES, INC.

together with others, devised and intended to devise a scheme and artifice to defraud consumers through the sale and advertising of Exide-manufactured DieHard brand batteries by means of material false and fraudulent pretenses, representations and promises, knowing that said pretenses, representations and promises were false and fraudulent when made.

6. For the purpose of executing the aforesaid scheme, and artifice to defraud and attempting to do so, the defendant, **SEARS AUTOMOTIVE MARKETING SERVICES, INC.** together with others known and unknown did on November 8, 1994, place and caused to be placed in a Post Office and authorized depository for mail, a matter to be sent and delivered by the Postal Service, to wit: an envelope containing a letter prepared by the Vice President of Sears Automotive to be mailed by Sears, Roebuck and Co., 3333 Beverly Rd., Hoffman Estates, Illinois, 60179 and delivered to Arthur M. Hawkins, Exide Corporation, 1400 N. Woodward Ave., Suite 130, Bloomfield Hills, MI 48304, regarding the sale of DieHard batteries within the Southern District of Illinois, and elsewhere.

All in violation of Title 18, United States Code, Sections 1341, 2 and 3551 *et seq.*

UNITED STATES OF AMERICA

W. CHARLES GRACE
United States Attorney

NORMAN R. SMITH
Chief, Criminal Division and
Assistant United States Attorney

MIRIAM F. MIQUELON
Assistant United States Attorney

HAL GOLDSMITH
Assistant United States Attorney

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	CRIMINAL NO.
vs.)	
)	
SEARS AUTOMOTIVE MARKETING)	
SERVICES, INC., a Delaware Corporation,)	
)	
Defendant.)	

STIPULATION OF FACTS

The United States of America, by and through its attorneys, W. Charles Grace, United States Attorney for the Southern District of Illinois, Miriam F. Miquelon, and Hal Goldsmith, Assistant United States Attorneys, along with the defendant, SEARS AUTOMOTIVE MARKETING SERVICES, INC., enter into the following factual stipulations:

1. Defendant SEARS AUTOMOTIVE MARKETING SERVICES, INC. [hereinafter "SAMS"] agrees that venue is proper in the Southern District of Illinois and waives any claim that venue is not proper in the Southern District of Illinois. SAMS was and is a wholly owned subsidiary of Sears, Roebuck and Company [hereinafter "Sears"].

2. In late 1993, approximately a year before the expiration of Sears' contract with its previous supplier of automotive batteries, Sears began a process called a Strategic Sourcing Initiative ("SSI"), for the purpose of examining the benefits and costs of selecting an alternative battery supplier for its DieHard battery line.

3. Sears retained A.T. Kearney, Inc. to provide consulting services as part of the SSI process.

4. Sears ultimately considered various proposals from three manufacturers of automotive batteries, including Exide Corporation ("Exide"), Johnson Controls, Inc. ("JCI"), and AC Delco ("Delco").

5. After evaluating the competing proposals, Sears selected Exide to produce the Silver and WeatherHandler DieHard battery lines. Sears selected Delco to produce the Gold DieHard battery line.

6. The contract between Sears and Exide specified that the DieHard batteries would be manufactured with certain proprietary design features, would meet specified quality standards for cold cranking amperes ("CCA") and reserve capacity ("RC"), and would be manufactured at plants that were approved by Sears.

7. During the week of October 22, 1994, after Sears began to sell Exide-produced DieHard batteries in September 1994, Sears became aware that some of the Exide-manufactured batteries had formation defects and as a result might fail to meet advertised CCA and RC specifications. During this time, Sears continued advertising Exide-manufactured DieHard batteries as America's "most trusted" and "longest lasting" battery, knowing that the batteries had a latent manufacturing defect.

8. Exide caused false entries to be recorded on the quality assurance testing reports prepared for Sears to conceal that the batteries did not meet the CCA and RC ratings required by the Sears-Exide contract. At the same time, Sears questioned the correctness of the Exide reports after conducting its own quality assurance tests which disclosed battery failures.

9. During the period it sold Exide-produced DieHard batteries, including the period when Sears was aware that some Exide batteries had formation defects, Sears at various times advertised the DieHard as America's "Most Trusted" and "longest lasting" battery. Sears in a press release also stated that its DieHard batteries had Silvium II alloy, 1" Breed lugs, and

Teflon-based HUP paste. There was never more than trace amounts of Silvium II in the batteries.

10. Unbeknownst to Sears, during 1995 and 1996, Exide used corporate funds to pay the Sears battery buyer \$10,000 per month as a "consulting fee." This was a sham consulting fee, as the battery buyer never performed any consulting work for Exide. The payment was an illegal gratuity and resulted in a deprivation to Sears of the loyal, true, and faithful services of its employee.

11. Sears and Exide terminated their relationship in early 1999. Exide does not manufacture automotive batteries for Sears today.

12. Sears acknowledges that A.T. Kearney projected a cost savings over an approximate one year period of approximately \$62,600,000 pursuant to entering into the "Master Agreement" with Exide during 1994 as described in the SSI.

13. There are other matters known to the defendant that are not included in this stipulation.

14. Each of the attorneys executing this Agreement on behalf of SAMS and/or Sears and the Government warrants and represents that he or she has been duly authorized and empowered to execute this Stipulation on behalf of each such respective party.

SO STIPULATED.

SEARS AUTOMOTIVE MARKETING
SERVICES, INC., a Delaware Corporation
Defendant

MIRIAM F. MIQUELON
Assistant United States Attorney

ANASTASIA D. KELLY
Director of Sears Automotive Marketing
Services, Inc., a Delaware Corporation

HAL GOLDSMITH
Assistant United States Attorney

F. JOSEPH WARIN
Gibson, Dunn and Crutcher, LLP

LANNY A. BREUER
Covington and Burling

Dated: _____

Dated: _____

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FILED

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

CLERK, U. S. DISTRICT COURT,
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS OFFICE

UNITED STATES OF AMERICA)
)
Plaintiff,)
)
v.)
)
EXIDE ILLINOIS, a wholly owned)
subsidiary of The Exide Corporation, dba)
Exide Technologies,)
JOSEPH C. CALIO III, and)
GARY MARKS,)
)
Defendants.)

Case No. 01-30035 DRH

Title 18,
United States Code,
Sections 371, 1343, 1346 and 3551
et seq.

INFORMATION

THE UNITED STATES ATTORNEY CHARGES:

COUNT ONE
CONSPIRACY TO COMMIT WIRE FRAUD
18 USC § 371

INTRODUCTION

At all times material to this information:

PARTIES

1. **EXIDE ILLINOIS** [hereinafter "**EXIDE**"] was and is Pennsylvania corporation, qualified to do business in the State of Illinois. **EXIDE** was and is a wholly owned subsidiary of a multinational corporation, the **EXIDE CORPORATION**, doing business as **EXIDE TECHNOLOGIES** [hereinafter "**CORPORATION**"].

2. The **CORPORATION**'s principal place of business was and is Reading, Pennsylvania,

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with worldwide business operations in the United States and Europe. EXIDE CORPORATION was and is a publicly traded corporation on the New York Stock Exchange (NYSE) in the business of manufacturing automotive and marine batteries, among other similar battery products. During 1994 through at least 1997, EXIDE and the CORPORATION manufactured and supplied several lines of batteries to Sears, Roebuck & Co.[hereinafter "Sears"], which batteries were marketed and sold to consumers, in the Southern District of Illinois and elsewhere, as part of the Sears "DieHard" battery product line. The CORPORATION and its officers and directors controlled the day to day operations of EXIDE, including manufacturing, distribution and other related business activities.

3. Defendant **JOSEPH C. CALIO III** was the vice-president of marketing at the CORPORATION. Defendant **CALIO** was also a shareholder of the CORPORATION. In his capacity as vice-president, defendant **JOSEPH C. CALIO III** would and did participate in the exercise of authority and control over the day to day business and operating decisions at the CORPORATION, including the decisions related to a contract entered into between Sears and the CORPORATION in 1994, and later renewed in 1997, for the sale and manufacture of car and marine batteries, among other such products, to Sears. Defendant **CALIO**, along with others, would and did deliver or cause to be delivered certain cash payments, disguised as "consulting payments," to the Sears battery buyer, one **GARY MARKS**, using corporate funds which payments would and did deprive Sears of the honest and faithful services of its employee.

4. Defendant **GARY MARKS** was the battery buyer for Sears between approximately May 1993 and December 1995. In his capacity as the Sears battery buyer, defendant **GARY MARKS** would and did participate in the exercise of authority and control over decisions involving purchasing product from outside vendors, including but not limited to the purchase of batteries

manufactured by the CORPORATION. Defendant **MARKS** would and did demand and agree to accept payments from the CORPORATION which payments, disguised as “consulting payments,” would and did deprive Sears of the honest and faithful services of defendant **MARKS**.

5. Defendant **EXIDE** and the CORPORATION through its employees, would and did cause fictitious entries to be included in the financial records of the CORPORATION to conceal the true nature of illegal cash payments and further caused certain cash payments to **MARKS** to be made in amounts less than \$10,000 to avoid bank financial reporting and disclosure requirements to the Internal Revenue Service.

ILLEGAL PAYMENTS

6. At all relevant times it was an offense under Illinois law to engage in acts of commercial bribery as set forth below:

5/29A-1. Offering a bribe

A person commits commercial bribery when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs.

5/29A-2. Accepting a bribe

An employee, agent or fiduciary commits commercial bribe receiving when, without consent of his employer or principal, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs.

7. Beginning in or about November 1, 1993, and continuing throughout all times material to this indictment, defendant **EXIDE** and the CORPORATION had written “Guidelines on Business Conduct” which prohibited certain “Unlawful Payments” as set forth below:

V. FAIR COMPETITION

. . . Payments or transactions that relate directly or indirectly to improper or illegal activities, such as bribes or kickbacks, are unacceptable business practices.

A. UNLAWFUL PAYMENTS

No unlawful payment is to be made to secure or maintain business, to influence any decision relating to the Company's business or affect the enactment or enforcement of any laws or regulations or to obtain favors. The purpose of this policy is to prohibit direct or indirect payments or gifts to payments, gifts or arrangements to or with any public or private individual including officials, employees and representatives of political bodies, governments and their branches and agencies, private corporations and organizations doing business or otherwise having dealings with the Company.

THE CONSPIRACY

8. Beginning in or about January 1994 and continuing until in or about May 1997, both dates being approximate and inclusive, in St. Clair County, in the Southern District of Illinois, and elsewhere,

**EXIDE ILLINOIS,
JOSEPH C. CALIO III, and
GARY MARKS,**

defendants herein, along with other corporations and individuals, did knowingly and wilfully combine, conspire, confederate and agree together to commit offenses against the United States, to wit: to violate Title 18, United States Code, Sections 1343 and 1346 (the wire fraud statutes) by using wire transfers in furtherance and execution of a scheme and artifice to defraud consumers of money and property by means of false and fraudulent pretenses, representations, and promises in connection with the distribution, sale and marketing of Sears' automotive batteries manufactured by defendant **EXIDE** and its parent, EXIDE CORPORATION. It was further a part

of the scheme and artifice to defraud that defendant **EXIDE**, together with the defendants **CALIO**, **MARKS** and others, would and did facilitate and guarantee the overall success of the scheme by depriving Sears of the intangible right of the honest, faithful, and impartial services of its employee, defendant **GARY MARKS**, and would and did deprive the shareholders of **EXIDE CORPORATION** of the intangible right of the honest, faithful, and impartial services of its management.

BACKGROUND TO THE CONSPIRACY

9. In or about 1993, Sears retained A.T. Kearney, [hereinafter "Kearney"] a Chicago based consulting firm, to assist Sears in negotiating a new battery manufacturing contract for the "DieHard" battery product line. The battery brand name "DieHard" was well known to consumers through nationwide advertising, including advertising aimed at consumers shopping at Sears automotive centers located in the Southern District of Illinois.

10. Kearney, together with Sears' employees, including the Sears battery buyer, defendant **MARKS**, conducted a Strategic Sourcing Initiative or SSI. The SSI program solicited various battery manufacturers to submit contract bids to manufacture all or part of the various battery products comprising the DieHard battery line. As part of the SSI, Kearney and others conducted "due diligence," an investigation into the qualifications of each prospective bidder.

11. In or about early 1994, a Sears quality assurance testing report was released regarding battery quality comparisons based upon selective battery product testing of various manufacturers. The **CORPORATION** was ranked lower in manufacturing quality than its competitors. In or about June 1994, an unnamed corporation received a report from its own battery testing expert disclosing

that the CORPORATION's Greer plant was manufacturing defective batteries that would be unacceptable in quality to an unnamed corporation.

12. Defendant **MARKS** would and did communicate material information about the various bidders to Sears' management in order to facilitate the final selection of the new manufacturer. EXIDE CORPORATION would and did submit a bid and business plan to Sears through its battery buyer, defendant **MARKS**, in or about early February 1994.

MANNER AND MEANS OF THE CONSPIRACY

13. It was a part of the conspiracy that defendant **EXIDE**, along with the CORPORATION, would and did operate the CORPORATION's business through a pattern of making cash payments and/or providing other things of value to employees of the CORPORATION's customers and other third parties. The payments, variously referred to as "consulting payments," travel advances, or "advances for promotional materials" were made at the CORPORATION's instruction to insure that the CORPORATION and its wholly owned subsidiaries, including **EXIDE**, would continue its business relationships with its customers regardless of the quality of its manufacturing processes.

14. It was further a part of the conspiracy that defendant **EXIDE** knew or should have known that such payments and gratuities made to employees of its customers deprived the customers of the honest, faithful, and impartial services of their employees, respectively, and represented a conflict of interest.

15. It was further a part of the conspiracy that the CORPORATION's Chief Executive Officer, Arthur Hawkins, would and did advise corporate employees that he intended to "set up" the

Sears battery buyer, defendant **MARKS**, as a corporate “consultant” while defendant **MARKS** was employed as the Sears battery buyer to “take care of” defendant **MARKS**.

16. It was further a part of the conspiracy that during the bidding process, **EXIDE**, along with the **CORPORATION**, misrepresented to Sears that its battery product design included certain “proprietary features” and was, among other things, the “cutting edge of technology” for the “next generation of DieHard,” and could be manufactured at a much lower cost to Sears than its competitors for similar product designs when in truth and in fact, **EXIDE** and the **CORPORATION** manufactured battery products that omitted proprietary features, utilized common inexpensive technology, and had reduced lead content in order to cut manufacturing costs.

17. It was further a part of the conspiracy that lead content, among other design specifications, directly affected the duration of battery performance after the battery was installed in a vehicle.

18. It was further a part of the conspiracy that the amount of lead content, among other design specifications, directly affected the ability of a battery to meet industry quality assurance testing standards. The two main industry standards used to test the quality of a battery were “Cold Cranking Amperes” or “CCA” and “Reserve Capacity” or “RC.” Each battery manufactured by the **CORPORATION**, for distribution to Sears and retail sale to consumers, would and did contain a label advising the consumer of the CCA and RC ratings for the battery.

19. It was further a part of the conspiracy that consumers would and did pay more money for Exide manufactured DieHard batteries based upon advertising and warranty claims that the subject DieHard batteries would meet the CCA and RC quality assurance standards and last longer than battery lines that were priced lower, when in truth and in fact, the battery products did not

contain proprietary design features, regularly failed CCA and RC testing, and contained manufacturing defects caused by a faulty formation process during manufacture.

20. It was further a part of the conspiracy that the CORPORATION would and did offer a contract bid that was materially lower than its competitors to ensure that Sears would accept the CORPORATION's offer, making defendant **EXIDE**, along with its parent corporation, the largest battery supplier in the world. In truth and in fact, the CORPORATION, its subsidiaries, and defendant **EXIDE** knew that in order to deliver the product at the proposed cost that the CORPORATION would be unable to supply a battery with enough lead and other design specifications to satisfy industry CCA and RC standards. Sears would and did accept the CORPORATION's bid, in part, because the cost of the battery to Sears was materially lower than other competing battery manufacturers.

21. It was further a part of the conspiracy that in or about August 1994, Sears awarded a battery manufacturing contract to the CORPORATION, its subsidiaries, and defendant **EXIDE** for the manufacture of numerous battery lines including the "DieHard Silver" battery. A contract entitled "Master Agreement between Sears and Exide" was entered into between the two companies [hereinafter "battery contract"].

22. It was further a part of the conspiracy that the battery contract included certain design specifications, including CCA and RC performance standards. Specifically, the contract provided that: "The cold cranking amps and reserve capacity targets should be met 95% of the time for all, [Store Keeping Units], SKU's at all factories." A SKU number identified a number of batteries in the same product group. In truth and in fact, numerous Exide batteries selected for quality testing as part of the representative sample would and did fail the SKU testing and corporate employees

were instructed by management to falsify SKU testing results on internal quality assurance reports that were provided to Sears.

23. It was further a part of the conspiracy that the contract required that batteries "shall be manufactured with the Silvium II alloy, HUP paste and one inch breed lug." In truth and in fact, the combination of the proprietary design features were either omitted during manufacture or offered no added value to the performance of the DieHard battery. Corporate management instructed that only negligible trace amounts of Silvium II or silver be added to the battery in order to reduce the CORPORATION's manufacturing costs. Further, HUP paste provided no added value to battery performance contrary to the CORPORATION's representations, and the breed lug was missing from certain product lines.

24. It was further a part of the conspiracy that **EXIDE**, along with the CORPORATION, would and did fail to provide all actual physical plans and design specifications of the batteries described in the battery contract to Sears to enable Sears to determine if the batteries were actually being manufactured according to the contract design and proprietary specifications when in truth and in fact, the batteries manufactured and supplied to Sears under the battery contract failed to meet the contract design and proprietary specifications, batteries regularly failed to pass the CCA and RC testing specifications, and the CORPORATION caused batteries to be manufactured at plants not approved in its contract with Sears which required batteries to be built at only approved plants.

25. It was further a part of the conspiracy that in or about September and October 1994, the CORPORATION and others would and did manufacture the initial battery shipment for Sears of approximately 750,000 (seven hundred fifty thousand) batteries. The CORPORATION and others, in direct violation of the battery contract, completed the "formation process" of the battery

manufacturing at one or more unapproved plants, including the Greer plant, resulting in hidden or latent defects in the batteries. The faulty formation process caused overheating of the batteries resulting in internal grid corrosion. The latent defects were not always readily apparent at the initial installation of the battery but could cause a malfunction months or even years after the initial battery installation.

26. It was further a part of the conspiracy that in or about September and October 1994, the CORPORATION and others would and did manufacture the initial battery shipment for Sears of approximately 750,000 (seven hundred fifty thousand) batteries that contained additional obvious manufacturing defects, including acid leaks, broken carrying straps, and dead batteries.

27. It was further a part of the conspiracy that the defective batteries were distributed by Sears to its automotive centers nationwide, including to automotive centers located in the Southern District of Illinois. Within approximately thirty days of delivering the batteries, the Sears automotive centers reported excessive problems with the batteries and Sears then advised the CORPORATION in writing that the CORPORATION was in breach of its contract.

28. It was further a part of the conspiracy that, in order to market and sell the Exide manufactured DieHard batteries, a nationwide advertising campaign was run both before and after the initial delivery of the defective batteries. The CORPORATION, acting together with others, would and did misrepresent and cause to be represented material facts to the consumers that the line of DieHard batteries manufactured by Exide were "America's most trusted battery" with a longer operating life, when in truth and in fact, the batteries were not manufactured according to contract design and proprietary specifications, did not have sufficient lead, regularly failed to satisfy CCA and RC contract requirements, and had both obvious and latent manufacturing defects, all of which

could reduce the operating life of the batteries well below the representations made to the consumers in the advertising. The CORPORATION and defendant **EXIDE** and others knew at all material times that the battery product being marketed was not the equivalent of the premium product being advertised.

29. It was further a part of the conspiracy that the CORPORATION, its wholly owned subsidiaries, including defendant **EXIDE**, acting together with others, would and did refuse to recall the initial battery shipment to conceal from consumers the latent and hidden manufacturing defects in order to safeguard and protect the "DieHard" brand name which had great monetary and economic value to Sears and to protect the CORPORATION's business reputation.

30. It was further a part of the conspiracy that defendant **EXIDE**, acting together with the CORPORATION, the defendants and others, knew that Sears would and did charge the consumer higher prices for the **EXIDE** manufactured DieHard batteries than other lower priced battery lines when in truth and in fact, if the battery defects as described in this indictment had been disclosed to the consumer, the consumer would not have paid a higher price for the DieHard battery as advertised.

31. It was further a part of the conspiracy that **EXIDE**, acting together with the CORPORATION and others, would and did engage and caused others to engage in acts of concealment to prevent the consumers from learning the true facts about the manufacturing defects, including but not limited to: the refusal to recall the batteries, false advertising, and extending the 24 month replacement warranties to 30 months in an effort to placate customers. The battery complaints became so voluminous that many sales associates refused to sell DieHard lines

manufactured by the CORPORATION and instead, sold higher volumes of the DieHard Gold product line manufactured by a corporate competitor.

32. It was further a part of the conspiracy that in late 1994, the CORPORATION's Chief Executive Officer, Arthur Hawkins, would and did travel to Chicago, Illinois, and to the Sears headquarters located in a suburb outside of Chicago. Hawkins met with Sears' battery buyer defendant **MARKS** at a restaurant and offered to pay him at least \$10,000 per month to ensure the continuing good will of Sears and the continuation of the contractual relationship. Hawkins would and did advise and counsel defendant **MARKS** to set up a shell consulting corporation for the sole purpose of receiving the payoffs and concealing the true purpose for the payments. Thereafter, defendant **MARKS** followed Hawkins' instructions and incorporated a shell company known as DG Consulting Inc.

33. It was further a part of the conspiracy that on or about March 5, 1995, defendant **MARKS** and others received confirmation from a "tear down" analysis of the Exide manufactured battery that there was no silver in the battery as required by the contract and that other defects existed in the batteries. Shortly thereafter on or about March 23, 1995, defendant **CALIO** delivered the first illegal gratuity payment to defendant **MARKS**. **EXIDE**, together with the CORPORATION and others, would and did continue to misrepresent or cause to be misrepresented to the consumers that the DieHard battery was a premium battery when in truth and in fact, it was not.

34. It was further a part of the conspiracy, that Hawkins would and did authorize the use of corporate funds to make seven separate \$10,000 payments and one \$9,000 payment to defendant **MARKS**, while **MARKS** was the Sears battery buyer, using corporate bank accounts.

35. It was further a part of the conspiracy that wire transfers were used to deliver in interstate commerce illegal payments to defendant **MARKS** as set forth more fully in the "OVERT ACTS" listed below.

36. It was a further part of the conspiracy that the CORPORATION, its wholly owned subsidiaries including defendant **EXIDE** would and did attempt to conceal or caused to be concealed, the payments to defendant **MARKS** by making and causing to be made false entries in the corporate financial books and records, including variously characterizing the payments as "consulting payments," travel advances, and advances to purchase promotional materials when in truth and in fact defendant **MARKS** never performed any consulting services for defendant **EXIDE** and/or the CORPORATION and the payments deprived Sears of the faithful, honest and independent services of its employee.

37. It was a further part of the conspiracy that a corporate engineer instructed employees to increase the lead content in the batteries manufactured for Sears. The CORPORATION's Chief Executive Officer Arthur Hawkins, upon learning about this, would and did instruct the employees to remove the additional lead because of his concern for the corporate profit figures for the end of the operating quarter. Later, when the engineer again advised management of the need to increase the lead content of the batteries, Hawkins threatened to fire the battery engineer.

38. It was further a part of the conspiracy that the defendants, through the aforementioned conduct, deprived the shareholders of the CORPORATION, its wholly owned subsidiaries including defendant **EXIDE** of the faithful, honest and independent services of their management.

39. In or about November 1996, the CORPORATION, acting together with others, would and did agree to pay five million dollars (\$5,000,000) to Sears. The CORPORATION used

corporate funds to pay Sears the five million dollars (\$5,000,000) in store allowances, which payment credits were made to Sears in early 1997 and distributed to various Sears stores.

40. In or about early 1999, Sears terminated the battery supply agreement with the CORPORATION, its wholly owned subsidiaries including **EXIDE**.

OVERT ACTS

41. In furtherance of the conspiracy and in order to accomplish the objects of the conspiracy, the defendants

**EXIDE ILLINOIS,
JOSEPH C. CALIO III, and
GARY MARKS,**

performed and caused to be performed, in the Southern District of Illinois and elsewhere the following overt acts:

a) In or about September 1994, Diehard batteries manufactured by the CORPORATION and its wholly owned subsidiaries, including defendant **EXIDE**, were delivered to Sears automotive centers located at 235 St. Clair Square, Fairview Heights, Illinois and 3000 W. DeYoung, Marion, Illinois, respectively, all in the Southern District of Illinois.

b) On or about October 28, 1994, the Sears automotive center located at 3000 W. DeYoung, Marion, Illinois, returned eleven (11) batteries found to be defective during a quality assurance audit conducted by the CORPORATION and the defendant **EXIDE** at the subject automotive center as a result of being notified by Sears of the contract breach.

c) During 1994, the DieHard battery line manufactured by the CORPORATION were advertised to consumers located in the Southern District of Illinois.

d) On or about September 5, 1995, a corporate employee approved a check request form, an internal corporate financial record, for an illegal payment of \$10,000 to the Sears battery buyer, defendant **MARKS** which form falsely reported that the payment was for consulting services.

e) In or about March 1995, a corporate employee advised defendant **CALIO** to unlawfully structure a \$10,000 payment to defendant **MARKS** to avoid bank reporting and disclosure requirements which regulations required the filing of currency reports by financial institutions for payments of more than \$10,000.00.

f) In or about June 1995, a corporate employee ordered defendant **CALIO** to deliver illegal cash payments to defendant **MARKS**, stating to just "do it" and that **CALIO** "had no choice."

g) In or about and between March 1995 and June 1995, defendant **CALIO** hand delivered two separate payments in the approximate amounts of \$10,000 and \$9,000 respectively to defendant **MARKS**, which payments defendant **MARKS** was not entitled to receive.

h) On or about January 31, 1996, the CORPORATION caused funds in the amount of \$10,000, less bank fees, to be wire transferred from its bank account at the CoreStates Bank in Philadelphia, Pennsylvania, wire transfer number B00035879 to DG Consulting, Inc., Lake Zurich, Illinois.

i) On or about February 1, 1996, after the subtraction of wire transfer fees, the amount of \$9,980 was deposited into the bank account maintained at the Bank of Palatine, Palatine, Illinois in the name of DG Consulting, Inc., account no. 051-594-01.

j) In or about December 1996, the CORPORATION issued Sears a \$1,000,000 credit as partial payment of the agreed upon five million dollars (\$5,000,000) in store allowances to induce Sears sales associates to sell DieHard batteries manufactured by the CORPORATION.

k) In or about January 1997, the CORPORATION issued Sears a \$4,000,000 credit as partial payment of the agreed upon five million dollars (\$5,000,000) in store allowances to induce Sears sales associates to sell DieHard batteries manufactured by the CORPORATION.

l) In or about 1997, the Sears Automotive Center located in Marion, Illinois was credited \$2,453.69 from the \$5,000,000 store allowance payment made by the CORPORATION to Sears.

m) In or about 1997, the Sears Automotive Center located in Fairview Heights, Illinois was credited \$447.01 from the \$5,000,000 store allowance payment made by the CORPORATION to Sears.

All in violation of Title 18, United States Code, Sections 371 and 3551 et. seq.

COUNT TWO
WIRE FRAUD
18 USC § 1343

42. The Grand Jury realleges and reincorporates by reference herein, the allegations contained in Count 1, paragraphs 1-33 of this Indictment, as constituting a scheme and artifice to defraud.

43. It was further a part of the scheme and artifice to defraud that defendant **EXIDE**, together with the CORPORATION and others would and did facilitate and guarantee and/or caused to be facilitated and guaranteed the overall success of the scheme by depriving Sears of the intangible right of the honest, faithful, and impartial services of its employee, defendant **MARKS**, and would and did deprive the shareholders of the CORPORATION, its wholly owned subsidiaries, including the defendant **EXIDE**, of the intangible right of the honest, faithful, and impartial services of its management.

44. Beginning in or about January 1994 and continuing until in or about at least April 1996, both dates being approximate and inclusive, in St. Clair County, in the Southern District of Illinois, and elsewhere,

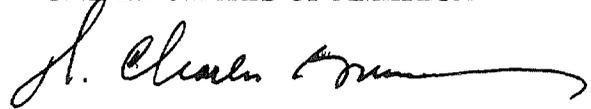
**EXIDE ILLINOIS,
JOSEPH C. CALIO III, and
GARY MARKS,**

defendants herein, along with other individuals, both known and unknown to the grand jury, for the purpose of executing the scheme and artifice to defraud consumers of money and property by means of false and fraudulent pretenses, representations, and promises in connection with the distribution, sale and marketing of Sears' automotive batteries manufactured by the EXIDE CORPORATION, caused to be transmitted by wire from a corporate bank account at the CoreStates Bank in Philadelphia, Pennsylvania, wire transfer number B00035879, writings, signs, and symbols

representing \$10,000 cash to an account maintained at the Bank of Palatine, Palatine, Illinois in the name of DG Consulting, Inc., account no. 051-594-01.

All in violation of Title 18, United States Code, Sections 1343, 1346, 2 and 3551 et.seq.

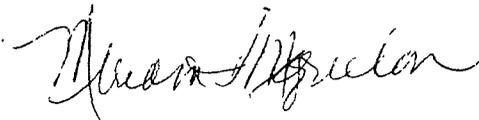
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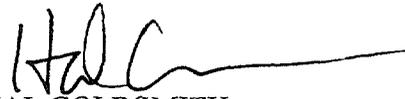
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